

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID M. FRUITS)	
Claimant)	
VS.)	
)	
SOUTHWESTERN BELL TELEPHONE COMPANY)	Docket No. 175,557
Respondent)	
Self-Insured)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals the February 10, 1997, Award of Administrative Law Judge Robert H. Foerschler.

APPEARANCES

Claimant appeared by and through his attorney James E. Martin of Overland Park, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney David M. Druten of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney Michael R. Wallace of Shawnee Mission, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

Whether claimant met with accidental injury arising out of and in the course of his employment with respondent on the date alleged.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant alleges accidental injury while working for respondent, Southwestern Bell Telephone Company, on September 16, 1992. Claimant indicated, he felt a pop in his back, followed by weakness and numbness while standing on a ladder and leaning over. Claimant testified he had been working approximately 20 feet up in the air with the ladder leaning against a telephone wire when the accident occurred.

Respondent contends claimant did not suffer accidental injury arising out of and in the course of his employment. Medical records provided at regular hearing show claimant was being treated by Mara Lee Pennell, D.C., in Independence, Missouri, at the time of the alleged accident. Claimant had received approximately 20 back adjustments with Dr. Pennell during the two months leading up to the alleged date of accident. The medical notes of Dr. Pennell dated September 9, 1992, indicate claimant suffered an exacerbation of his preexisting back problems while lifting a trash bag of canned goods. The medical notes of Dr. Pennell dated September 16, 1992, make no mention of any back injury suffered while at work. In fact, the questions on the patient questionnaire asking whether claimant experienced any new conditions or suffered any new accidents or new injuries were all answered in the negative. It is significant that claimant has had a history of ongoing back problems for many years. It is also significant that claimant had a prior back injury in 1985 for which he claimed workers compensation benefits, received a settlement, and was awarded a 5 percent permanent functional impairment. While claimant was receiving ongoing treatments for these new symptoms with Dr. Pennell, he indicated to her that his symptomatology was a continuation of his prior 1985 back problems. Dr. Pennell was not told of any injury suffered on September 16, 1992.

A review of the medical record fails to elicit any information indicating that claimant alleged an accidental injury on September 16, 1992, until claimant was examined by David A. Tillema, M.D., a court-appointed independent medical examining physician, on March 11, 1996. At that time, claimant advised Dr. Tillema that he had suffered an injury on September 16, 1992. However, by that time, claimant had also suffered additional injuries to his low back in both March of 1995 and June of 1995. Dr. Tillema was provided no information regarding those most recent injuries. When asked about those incidences, Dr. Tillema admitted that, without accurate information, he would not be able to comment regarding how much of the 7½ percent functional impairment he attributed to claimant's back would be from the 1992 injury and how much would be attributable to either

claimant's preexisting conditions or the more recent injuries in 1995. Dr. Tillema went on to acknowledge that, based upon the information he had, there would be no way for him to apportion his functional impairment rating on claimant to any of the specific injury dates.

In proceedings under the Workers Compensation Act the burden of proof is on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 1992 Supp. 44-501 and K.S.A. 1992 Supp. 44-508(g).

In this instance, the testimony of claimant is seriously questioned by the medical history given to Dr. Pennell and the medical history provided to Dr. Tillema at the time of examination. The lack of any information in Dr. Pennell's medical notes that claimant suffered an injury on September 16, 1992, when claimant was examined and treated for his alleged back injury on that very date is damaging to claimant's credibility. The omissions from claimant's injury history when he was examined by Dr. Tillema cause the Appeals Board to again question claimant's credibility.

In this case, claimant testified before Administrative Law Judge Robert H. Foerschler, who had the opportunity to view claimant in person and to reach an opinion regarding the veracity of claimant's testimony. Judge Foerschler, after reviewing the medical records and hearing claimant's testimony, found claimant to be less than credible. The Appeals Board in reviewing the medical evidence and the testimony must agree with Judge Foerschler's assessment of the evidence. The omissions from the record raise serious questions about claimant's alleged injury. The Appeals Board finds, based upon a review of the credible evidence, that claimant has failed to carry his burden of proving that he suffered accidental injury arising out of and in the course of his employment on September 16, 1992.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated February 10, 1997, should be, and is hereby, affirmed and an award is denied claimant, David M. Fruits, and against respondent, Southwestern Bell Telephone Company, a qualified self-insured, and the Kansas Workers Compensation Fund, for the alleged injury of September 16, 1992.

The fees necessary to cover the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Richard Kupper & Associates	\$415.85
Rebecca J. Ramsay, RPR	\$151.75

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James E. Martin, Overland Park, KS
David M. Druten, Kansas City, KS
Michael R. Wallace, Shawnee Mission, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director